

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy

From: Steven Benito Russo, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of Proposed Regulations 18722 and 18117: Statement of Economic Interests Filing Obligations

Date: August 10, 2005

Executive Summary

This project proposes two new regulations intended to impart greater clarity to certain filing obligations that arise under the Political Reform Act (the “Act”).¹ One of the proposed regulations addresses a number of rather specific issues that have arisen concerning precisely when an official is required to file statements of economic interests. (Proposed regulation 18722.) The other proposed regulation specifies that the failure of a person’s filing officer to fulfill any duty imposed under the Act will not relieve the person of any filing or disclosure obligation. (Proposed regulation 18117.)

At its July 2005 meeting, the Commission engaged in a pre-notice discussion of this project. In the course of that discussion, the Commission generally favored passage of the two proposed regulations to final adoption, but wanted to consider alternative language for proposed regulation 18722 that would establish simpler rules for determining when an official assumes or leaves office, and thereby incurs a duty to file a statement of economic interests. The Commission also requested that language be included in regulation 18722 to specify that a person shall not be deemed to have left office when taking a leave of absence or serving as an intermittent employee.

Consistent with the Commission’s direction during the pre-notice discussion of this project, staff offers a revised draft of proposed regulation 18722 with decision points concerning optional language to define assuming and leaving office, and language that deals with persons taking a leave of absence or serving as an intermittent employee. Staff also offers a draft of proposed regulation 18117 that is unchanged from the pre-notice discussion.

Staff supports adoption of the two proposed regulations, and makes the following recommendations regarding the decision points:

¹ The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

- **Decision Point 1:** Two options are proposed in subdivision (a) of regulation 18722 for identifying the date that a person assumes office. Option 1 proposes that a person assumes office on the date that the person is authorized to serve in the position, as by being sworn in. Option 2 proposes that a person assumes office either on the date the person is authorized to serve in the position, as by being sworn in, or, except in the case of an elected official, on the date the person begins to perform the duties of the office, whichever occurs earlier.
Recommendation: Staff recommends adoption of Option 2.
- **Decision Point 2:** Language proposed at the pre-notice discussion which makes the date of leaving office the date that an official stops performing the duties of the office in addition to no longer being authorized to perform the duties of the office, is now offered as an option.
Recommendation: Staff recommends adoption of the optional language.

Proposed Regulation 18722

A. Background

An express purpose of the Act, as set forth in section 81002, subdivision (c), is to ensure that the assets and income of public officials, which may be materially affected by their official actions, be disclosed, so that conflicts of interest may be avoided. In furtherance of this purpose, the Act establishes two categories of public officials who must periodically disclose their economic interests on SEI's.

One category is composed of officials, including high-ranking elected officeholders, who are specifically listed in section 87200. Most of these officials are required by section 87202 to file an SEI within 30 days after assuming office. But those officials who are subject to confirmation by the Commission on Judicial Appointments or the State Senate must instead file an SEI within 10 days after being appointed or nominated. In addition, the officials listed in section 87200 must thereafter file SEI's annually as provided in section 87203, and file a final SEI within 30 days after leaving office, as provided in section 87204.

The other category is composed of officials who are not listed in section 87200, but are required to file SEI's under the provisions of the conflict of interest code of the agency that employs them. Section 87300 requires every agency to adopt and promulgate a conflict of interest code. Section 87302 prescribes the requirements for every conflict of interest code, including the requirement that an employee of an agency who makes or participates in making governmental decisions that may have a reasonably foreseeable material effect on one or more of the employee's economic interests, must be designated in the agency's conflict of interest code as a person required to file SEI's disclosing his or her economic interests. Mirroring section 87202, section 87302 goes on to state that every conflict of interest code must require that the agency's designated employees not subject to confirmation by the State Senate file an SEI within 30 days of assuming office, but if subject to Senate confirmation must file within 30 days of

being appointed or nominated. Then mirroring sections 87203 and 87204, section 87302 states that every conflict of interest code must require that an agency's designated employees file SEI's annually thereafter and a final statement within 30 days after leaving office.

B. Date of Assuming Office

While specifying that an SEI must be filed within 30 days after assuming office would appear to be a rather specific directive, questions have arisen over the years as to the precise meaning of "assuming office." In the absence of a clarifying regulation, such questions have been answered through staff advice. Staff has advised that, at a minimum, a person assumes office when the person is formally authorized to serve in the office, as by being sworn in. (*Montoy* Advice Letter, No. I-96-206.) This simple definition of assuming office is set forth as **Option 1 of Decision Point 1** in subdivision (a) of proposed regulation 18722.

However, in rendering advice, staff has been confronted with the fact that for most of the people who are required to file statements of economic interests, the process of beginning service in a new position is rather informal, and does not involve an official ceremony such as being sworn into office. Indeed, most designated employees of governmental agencies simply report for work after being hired, with no more ceremony than the completion of a few personnel forms at some point after starting work in order to get paid and receive benefits.

Moreover, many individuals, including those serving in elected positions, may find themselves performing official duties well before being sworn in or appearing on an agency payroll, in their efforts to "get up to speed" with the new position, or "hit the ground running," or make the transition of duties from the former officeholder as smooth as possible.

Faced with these realities, staff introduced through advice a broader definition of what constitutes assuming office. The most succinct statement of that advice appears in the *Aramburu* Advice Letter, No. A-02-156. In that letter, staff was asked to declare when an individual serving on the Delta Protection Commission (the "DPC") assumes office. The request for advice noted that a new commissioner may begin performing the duties of a commissioner well before an actual swearing in ceremony takes place. In response, staff advised:

"For the purposes of reporting, an individual appointed to the DPC assumes office when he or she is authorized to serve as a member of the DPC by being sworn in, making a governmental decision, or otherwise being authorized to serve as a DPC member, whichever is earlier."

The letter then declared in a footnote:

"We do not provide an exhaustive list here of the ways in which an individual may be 'authorized to serve' since this could depend on a factual determination. For example, if an appointee to the DPC appears before another agency and acts or purports to

act on behalf of or as a representative of the DPC prior to being sworn in, the appointee may be deemed a public official who is authorized to serve and subject to the disclosure rules.”

Under this advice, the event signaling that a person has assumed office, and therefore triggered a filing obligation is either: (1) the person has been formally invested with the authority of the position; or (2) the person has less formally been given license to perform the duties of the position. Whichever way the person may be said to have assumed office, the result is that the person has thus been placed in a position to make, participate in making, or attempt to use his or her official position to influence a governmental decision that may have a reasonably foreseeable material effect on one or more of the person’s economic interests. With that, as this letter concludes, the disclosure provisions of the Act should therefore be triggered.²

The broader definition of assuming office offered in *Aramburu, supra* is set forth as **Option 2 of Decision Point 1** in subdivision (a) of proposed regulation 18722, with one exemption. At the request of the Commission, the expanded definition of assuming office proposed in Option 2 specifically exempts elected officials who are required to be sworn into office. So even if these officials start performing the duties of office prior to being sworn in, they would not be required to file an assuming office statement of economic interests until after being authorized to serve in the position as by being sworn in. However, most candidates for elective office are required by section 87201 to file a statement of economic interests disclosing their economic interests at the time they declare their candidacy. So while exempting elected officials who are required to be sworn in serves the purpose of providing a bright-line rule for when these officials must file an assuming office statement of economic interests, any potential impact on disclosure occasion by the resulting delay in filing would be substantially lessened by the fact that the officials already have recent statements on file.

Staff Recommendation: Staff recommends that the Commission adopt Decision Point 1, Option 2, as it establishes a definition for assuming office that is broad enough to be applied to the range of circumstances in which a person takes on a new position, promotes economic disclosure close to when officials start being involved in governmental decisions, and still provides a bright-line rule for elected officials.

C. Date of Appointment or Nomination

In contrast to the vast majority of public officials at the state and local level who are required to file an assuming office statement of economic interests within 30 days after assuming office, there are relatively few officials subject to confirmation by the Commission on Judicial

² By declaring that a person may be deemed to have assumed office, not just by making or participating in making a governmental decision, but by attempting to use his or her official position to influence a governmental decision, this advice is also consistent with section 87302, subdivision (d), as amplified by regulation 18730, subdivision (b)(5.5), which only allows a newly appointed official to resign from office without filing an assuming office statement of economic interests if the official resigns prior to making, participating in making, or using his or her official position to influence a governmental decision.

Appointments or the State Senate and therefore, are required to file an assuming office statement of economic interests within 10 days after being nominated or appointed. Nonetheless, as questions have arisen about precisely when a person may be deemed to have been appointed or nominated, subdivisions (a)(2) and (a)(3) of proposed regulation 18722 offer definitions for these terms. Borrowing language from section 18525 of the Government Code, which defines “Appointment,” as it relates to state civil service positions, subdivision (a)(2) declares that a person is appointed to a position when the person accepts an offer of appointment from the appointing authority. Then borrowing language from section 18525 of the Government Code, which deals with the procedures for Senate confirmation of an appointment by the Governor, subdivision (a)(3) states that a person is nominated when the appointing authority submits the person’s nomination to the confirming body.

When the Commission considered these definitions at the pre-notice discussion of this project, the only concern voiced was that the definitions be tied to a statutory reference so as to minimize any confusion about their application. This is accomplished with the opening phrase of proposed regulation 18722, which states that the provisions of the regulation are for “the purposes of Government Code sections 87202 and 87302.”

D. Date of Leaving Office

As for determining when a person “leaves office,” and thereby incurs an obligation to file an SEI within the following 30 days, the term “leaves office” has been particularly subject to dispute. One part of the dispute has centered on what to identify as the point at which an official leaves office, in light of the fact that officials often leave office more in stages than as a single sudden event. Another part of the dispute has been a spirited debate over whether the definition for leaving office that is applied to SEI filing should be the same or different than for other requirements of the Act.

As to whether the definition for leaving office that is applied to SEI filing should be the same or different than for other requirements of the Act, those in favor of a universal rule applicable throughout the Act have contended that the rule for SEI filing purposes should be the same rule that applies to the one-year “revolving door ban” imposed by section 87406. Under that section, specified state officials are prohibited, for a period of one year after leaving office, from representing any other person by appearing before or communicating with, for compensation, their former agency in an attempt to influence agency decisions that involve the making of general rules (such as regulations or legislation), or to influence certain proceedings involving a permit, license, contract, or transaction involving the sale or purchase of property or goods. For the purposes of this section, an official is deemed to have left office when he or she has permanently left state service, or is on a leave of absence, and is no longer receiving compensation, including compensation for unused vacation time. (Regulation 18746.1, subdivision (b)(1); *Weil* Advice Letter, No. A-97-247; *Negrete* Advice Letter, No. A-99-177.)

Opponents of a universal rule have argued back that putting aside the esoteric purity of it, there is no practical reason to apply the same definition of leaving office that is used in the

revolving door context to SEI filing, and that a different rule solely applicable to SEI filing is preferable. Specifically they have noted that it would be unduly burdensome on officials and filing officers if officials were required to file a leaving office SEI whenever taking a leave of absence (and then a new assuming office SEI when returning from that leave). Moreover, to delay the obligation to file a leaving office SEI until after a departing official stops receiving compensation and uses up all accrued leave time could unnecessarily delay reporting of the official's financial interests until several months after he or she effectively leaves office, and may require the reporting of economic interests acquired well after effectively leaving office.

In rendering advice, Commission staff has advised since 1996 that a different definition of leaving office should apply to the duty to file a leaving office SEI than to calculating the start of the one-year revolving door ban. When considering this issue at the pre-notice discussion of this project, the Commission also generally agreed with staff. This leaves for decision the other aspect of the dispute over what constitutes leaving office, fixing the point in time of leaving office that works best for SEI reporting. This is the subject of **Decision Point 2** in subdivision (b) of proposed regulation 18722.

Mirroring the definition for assuming office contained in subdivision (a) of the regulation, the proposed language of subdivision (b) states that, at a minimum, an official leaves office when he or she is no longer authorized to perform the duties of the office. However, as this simple language may prompt as many questions about precisely when an official shall be deemed to have left office as it answers, staff advice has been more expansive. Staff has advised, that for SEI reporting purposes, an official shall be deemed to have left office when the official stops performing the duties of the position. (*Carr Advice Letter*, No. I-93-387.) In other words, it is the date that the official walks out of the agency's door, never to return to work again, regardless of whether the person will continue to receive compensation for a period of time, or appear on the agency's employee roster while using accrued leave time.

There are several arguments in favor of this definition of leaving office for SEI filing purposes. One argument is that if the duty to file a leaving office statement is triggered when the person stops performing duties, then there will be disclosure closer in time to when the person was involved in governmental decision making. Another argument is that since the purpose of SEI disclosure is to reveal potential conflicts of interest when the person is involved in decision making, there is no basis for requiring disclosure at some later point. Still another argument is the practical consideration that a filing officer is in a much better position to require an official to file a leaving office SEI if the statement is due at the end of an official's last day on the job, rather than on some later date when the official may not be as accessible, and the urgings of agency staff may seem less compelling.

The optional language of **Decision Point 2** is intended to codify the above-described advice that an official leaves office for SEI reporting purposes when the official is no longer authorized to perform the duties of the office, and stops performing those duties.

Finally, in response to a request by the Commission during the pre-notice discussion of this project, a sentence now appears at the end of proposed subdivision (b), clarifying that a

person shall not be deemed to have left office, thus triggering a duty to file a leaving office statement, merely because the official is taking a leave of absence or serving as an intermittent employee.

Staff Recommendation: Staff recommends that the Commission adopt the proposed subdivision (b), including the optional language, as a practical definition for leaving office that best promotes effective economic disclosure by departing public officials.

E. Alternates and Designees

Another specific issue that has arisen concerning when a person has a duty to file an SEI is the issue of when a person serving as an alternate or designee must file. By way of background on this issue, a number of councils, boards, and commissions include members who are appointed to serve as alternates, and therefore only participate as decision-making members of the board or commission when a particular need arises due the absence of one or more regular members. The California Coastal Commission is one such entity. Neither the Act nor Commission regulations expressly addresses the filing obligations of alternates.

Similarly, a number of councils, boards, and commissions have as members specified officeholders who may serve on the councils, boards, or commissions themselves, or designate other individuals to serve in their place. The State Treasurer, for example, is a prescribed member of a large number of state boards and commissions, but he is permitted by the rules of these entities to have a designee serve in his place. Here again, neither the Act nor Commission regulations expressly addresses the filing obligations of designees. Previously, questions about when alternates and designees must file SEI's have been answered through staff advice.

A pivotal advice letter issued on this subject was the *Jenkins* Advice Letter, No. A-99-135. That letter specifically addressed the question of whether the members of a council who serve as alternates should be designated in the council's conflict of interest code as persons who must file SEI's. The conclusion reached in the letter was that all positions authorized to make or participate in making governmental decisions should be included in a conflict of interest code, regardless of the frequency with which they are called upon to use their authority. As such, alternates would be required to file SEI's in the same manner as regular members.

Subdivision (c) of proposed regulation 18722 applies the principles of the *Jenkins* letter to the issue of SEI filing by alternates and designees who serve on a council, board, or commission, by expressly making them subject to the same filing requirements as regular members. When the Commission considered this provision at the pre-notice discussion of this project, there was no objection to its adoption.

Proposed Regulation 18117

A. Background

In addition to imposing various duties on individuals and entities to disclose information to the public through the filing of documents such as SEI's and campaign statements and reports, the Act and Commission regulations also impose various duties on the filing officers and filing officials whose job it is to collect those documents. Specifically, section 81010 provides:

“With respect to reports and statements filed with him pursuant to this title, the filing officer shall:

- (a) Supply the necessary forms and manuals prescribed by the Commission;
- (b) Determine whether required documents have been filed and, if so, whether they conform on their face with the requirements of this title;
- (c) Notify promptly all persons and known committees who have failed to file a report or statement in the form and at the time required by this title;
- (d) Report apparent violations of this title to the appropriate agencies; and
- (e) Compile and maintain a current list of all reports and statements filed with this office.”

Commission regulations then amplify these duties with provisions set forth in regulation 18110 concerning the duties of filing officers with respect to campaign statements, and provisions set forth in regulation 18115 concerning the duties of filing officers and filing officials with respect to SEI's.

In addition to these enumerated duties, filing officers and filing officials often take on the responsibility to notify individuals of their SEI filing obligations.

B. Impact of Filing Officer Non-compliance on Filer Obligations

With filing officers having specified duties that they must perform under the Act, a question has arisen as to whether, and to what extent, the failure of a filing officer to perform any of these duties or to provide notice of a filing obligation impacts the filer's responsibilities.

It should be noted that none of the filing or disclosure obligations imposed by the Act are expressly stated to be dependent upon any actions by the filing officer – not even the issuance of any notice of a duty to file. Nonetheless, individuals failing to comply with filing or disclosure obligations have often tried, particularly in the context of an enforcement action, to claim excuse in the alleged failure of a filing officer to fulfill some duty or provide some notice.

Proposed regulation 18117 is intended to specifically address such contentions by declaring that the failure of a filing officer or filing official to comply with any duty or provide any notice will not affect the duties of a filer. When the Commission considered this regulation at the pre-notice discussion of this project, there was no objection to its adoption.

Attachments

Attachment 1 – Proposed Regulation 18722

Attachment 2 – Proposed Regulation 18117